he learned he was to testify, he asked for the originals (159-160).

Two of the registration cards had been found by Lt. Horan not to be in petitioner's handwriting (165-166), but they had been introduced in evidence along with the others. Subsequently these two cards were excluded from the evidence (165-166). These cards did not bear the names "Mr. and Mrs. L. Lewis"; one was signed "Mr. & Mrs. M. Lewis" and the other "Warren Lewis" (189, 191).

Lt. Horan did not know who wrote the license plate numbers shown on the motel registration cards (167).

Lt. Horan's report was placed in evidence as Exhibit 7 (172).

The Department rested (175). The petitioner offered no evidence (175). The petitioner moved to dismiss (175). In his argument, counsel for petitioner stated that petitioner had been legally separated from his wife as of March 20, 1968 (175). He conceded the petitioner had no permission to operate a newspaper route, but he pointed out that the petitioner was self-employed, not an employee of the newspaper (177).

(2)

By memorandum dated November 8, 1972, the Trial Commissioner, after reciting the charges, stated (29-31, A8a-9a):

> "A trial was completed before me on July 11, 1972.
>
> On September 21, 1970, Dr. Sidney Shapiro was found dead in his automobile in Westchester County apparently the victim of a homicide by gunshot. Anonymous telephone calls to law enforcement agen-

cies alleged that a New York City patrolman was friendly with a doctor's wife and that the patrolman had hired someone to kill Dr. Shapiro. The respondent was identified as the above patrolman. He is legally separated from his wife.

On September 24, 1970 the respondent in the presence of investigators of this department told representatives of the New York State Police that he had been having an affair with Mrs. Nina Shapiro at the time of the death of her husband. He further stated that on the date of the homicide he had gone to a motel with Mrs. Shapiro and registered under the name of Mr. and Mrs. L. Lewis at Parkway Motel. They had gone to motels on other occasions.

On June 8th and June 17th, 1971 the respondent was questioned by representatives of the Internal Affairs Division of this department. He then said that the statement he made to the New York State police was false. He was specifically asked if he had registered on 27 different dates between January 19, 1970 and September 29, 1970 mostly at the Parkway Motel in Elmsford, New York using the name Mr. and Mrs. L. Lewis. The respondent's reply was 'I don't recall.'

The department produced a handwriting expert who examined the motel registration cards and department records which contained respondent's signature and handwriting. It was his opinion that the respondent made them. Respondent did not offer any proof to show that the cards were not in his handwriting.

The respondent conceded that he had made a statement to the New York State Police that he had

been at a motel with Mrs. Shapiro on September 21, 1971 the day of the homicide but contends that statement was made under pressure.

The respondent was separated from his wife for three years prior to the date of these specifications which are dated August 16, 1971.

During the course of this investigation, it was also disclosed that the respondent had a newspaper delivery service and had not obtained permission from the Police Commissioner to engage in this employment. It was also disclosed that he had registered a motor vehicle in the State of New Jersey when actually he was not a resident of that state.

Findings

I find that the statements of the respondent that he could not recall whether he had registered at a motel with Mrs. Shapiro on 27 occasions were evasive and false.

I find that his original statement to the State Police that he had cohabited with Mrs. Shapiro on September 21, 1970 was true.

The respondent was married at the time that he had relations with a married woman on numerous occasions.

There is an obvious suspicion that the respondent was involved in the homicide of Dr. Shapiro but apparently there is no proof that he was responsible for his death.

I find the respondent NOT GUILTY of Specification No. 3, and GUILTY of Specifications Nos. 1, 2, 4 and 5.

The respondent has 7 years of service in the department without any prior record.

Recommendation

I recommend that the respondent be DISMISSED from the Police Service of the City of New York."

ARGUMENT

Petitioner's claim that he was found guilty of "suspicion of homicide" is without foundation.

There is nothing in the evidence to indicate that the hearing accorded petitioner violated petitioner's constitutional rights under due process and equal protection of the laws.

(1)

In the petition, petitioner claims that he was found guilty of involvement in the death of Dr. Shapiro. The argument is that the Hearing Officer made a specific finding of this (Pet., p. 7). This argument lacks merit.

In his memorandum to the Police Commissioner, the Hearing Officer simply reported what is a fact: "There is an obvious suspicion that the respondent was involved in the homicide of Dr. Shapiro *but apparently there is no proof that he was responsible for the death*". (A10a, emphasis added).

This is not a "finding" of any sort. It is merely an item of information which the Hearing Officer felt he should pass on to the Police Commissioner. The latter might well want to know if suspicion still existed with respect to petitioner's involvement in the homicide or whether the petitioner had been exculpated. It in no way affects the specific findings that the petitioner was guilty of charges 1, 2, 4 and 5, none of which relate to the homicide.

The testimony before the Hearing Officer contains practically no evidence respecting the homicide. The only time the fact the petitioner was a suspect in the homicide is mentioned is in Mr. Conover's answer to a question by petitioner's own attorney (91):

> "Q. Was he a target in a homicide. A. Possibly a suspect."

The charges being tried did not include any relating to a homicide. Some indication that the question of the petitioner's involvement in the homicide was not being tried before the Hearing Officer is the fact that petitioner, represented by counsel, never found it necessary to invoke his privilege against self-incrimination.

It is noteworthy that the New York Appellate Division and the New York Court of Appeals unanimously rejected petitioner's argument that he was found guilty of "suspicion". The allegation that petitioner was found guilty of suspicion does not involve a question of due process. The State Courts gave an interpretation of the evidence and an interpretation of the Hearing Officer's memorandum, which was reasonable and should not be disturbed.

(2)

Petitioner also claims that the hearing was held in an "atmosphere of confusion and suspicion" resulting in petitioner being denied a hearing as required by the Due Process and Equal Protection Clauses (Petition, p. 8). The petitioner does not call to the Court's attention any specific instances in the proceedings to support his contention. A reading of the minutes gives no indication of any basis for this assertion.

(3)

Petitioners also argues that the punishment of dismissal constituted cruel and inhuman treatment (Pet., p. 8). The cruel and inhuman punishment clause appears to apply only to punishment in criminal cases after conviction and sentence. See *Trope* v. *Dulles*, 356 U.S. 86, 99-102 (1958); *Weems* v. *United States*, 217 U.S. 349, 368 (1910); *Johnson* v. *Glick*, 481 F. 2d 1028, 1031 (2d Cir., 1973), cert. den. sub nom. *Employee-Officer John* v. *Johnson*, 414 U.S. 1033 (1973).

The charges against petitioner included "moonlighting", registering a car in New Jersey, co-habiting with Mrs. Shapiro and giving evasive and untrue answers in an official proceeding. Under New York law, the charge of giving evasive and untrue answers, by itself, justified the dismissal. See *Matter of Donnelly* v. *Police Department*, 40 AD 2d 649, 336 N.Y.S. 2d 508 (1st Dept., 1972).

CONCLUSION

The petition for writ of certiorari should be denied.

September 27, 1974.

Respectfully submitted,

ADRIAN P. BURKE,
Corporation Counsel of the
City of New York,
Attorney for Respondent.

L. KEVIN SHERIDAN,
LEONARD KOERNER,
of Counsel.